IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

Nos. 318, 319, and 320.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*; THE CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., *Appellees.*

and—

SAME
vs.
WIRT ADAMS, *State Revenue Agent*; THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., *Appellees.*

and—

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*, ET AL., *Appellees.*

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF.

Our excuse for filing a joint brief is that there are many points substantially alike or similar in the three cases, and we think this course will save the court both time and labor.

Of these three suits, the first two are to enjoin the making of assessments for and suits to collect the taxes, and the last one is to enjoin any distraint for or suit for collection of the taxes on an assessment already made.

The first two are filed by the Illinois Central Railroad Company, a foreign corporation, as sole plaintiff, claiming a right in the first case to file the bill as lessee and as a creditor and bondholder of the Canton, Aberdeen and Nashville Railroad Company, which is made a defendant as owner of the road and lessor.

The undisputed affidavit of the appellee, Wirt Adams, introduced on the hearing of the motions for an injunction on the one side and to discharge the restraining order on the other, shows that a majority of the directors in said Canton, Aberdeen and Nashville Railroad Company were also directors in said plaintiff company, and that a majority of its stock was also owned by said last-mentioned company (Record in No. 318, p. 33).

In the second case the right to file the bill is claimed as a bondholder and creditor of the Yazoo and Mississippi Valley Railroad Company and as the owner of the Mississippi Valley Company, a domestic corporation, which owned a majority of the stock of said Yazoo and Mississippi Valley Railroad Company, and said last-named company is made a defendant (our brief in No. 319, pp. 5, 6). In neither case is there any pretense of a request to the railroad companies owning the property and made defendants to sue. The said Mississippi Valley Company is not made a party. The trustees of the mortgages are not made parties. The unsecured claims are not reduced to judgment, and the suits are brought by a single bondholder, and are not on behalf of the plaintiff and the other bondholders.

These points are argued in our separate briefs on the motions to dismiss or affirm in Nos. 318 and 319, on pages 19–25 and 20–27 respectively. Counsel for appellants, recognizing the force of this, seek to escape the dilemma by asking

this court to treat these cases as not involving diversity of citizenship, but a Federal question, and to arrange the parties on the proper side of the docket. We will show hereafter why this cannot be done.

The third suit is filed by the Yazoo and Mississippi Valley Railroad Company, a domestic corporation, the owner and the proper plaintiff, showing that there was no excuse nor necessity for the Illinois Central Railroad Company filing the previous bill, and both suits were heard together by consent (Record in No. 320, p. 20).

The first two suits pertain to *back taxes*, the one to taxes of the years 1886–1897, and the other to taxes of the years 1886–1891. The third suit has reference alone to *current* taxes of the year 1898.

So it will be seen that one question embraced in the first two suits and certified to this court, that of non-residence, was eliminated from the last, which must stand, if at all, on the presence of a Federal question.

There was also another question, which was peculiar to the first two suits. They were primarily to enjoin the railroad commission, acting as State railroad assessors, from proceeding to finish making an assessment which they had already begun. It had been expressly decided by the supreme court of Mississippi that this could not be done.

Y. & M. V. R. R. Co. *vs.* Adams, 73 Miss., 662, 663.

And this court had expressly decided that such a decision raised no Federal question.

N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

It is true the right to file the bill in the above case of R. R. Co. *vs.* Adams was claimed to be conferred by the statute, and it may be contended that the State statutes do not apply in the equity practice in the United States courts, but by reference to that case it will be seen that the real contention was that the statute *enlarged* the equity rule, and

that neither the railroads nor the court considered that such a bill would lie under the general equity rules and practice.

We have argued this point in our separate briefs, on pages 36 and 43 in No. 318 and pages 19, 20, and 32–34 in No. 319.

We wish here to call the attention of the court particularly to the fact that in the above suit of R. R. Co. *vs.* Adams, 73 Miss., 648, the bill was filed by the two plaintiffs in these suits, The Illinois Central and Yazoo and Mississippi Valley Railroad Companies. They chose their own forum and voluntarily filed that bill in the State court, and this court and the lower Federal courts have often held that a party will not be permitted to experiment in any such manner, and that when he has *voluntarily* gone into the State courts and met an adverse decision there he will not be permitted to transfer his litigation to the Federal courts and relitigate the same questions. Instructive cases on this point are:

Forsyth *vs.* Hammond, 166 U. S., 517, 518.
Rosenthal *vs.* Coates, 148 U. S., 147, 148.
French *vs.* Hay, 22 Wall., 238.
See our separate brief in No. 320, pages 33, 34, and Blythe *vs.* Hinkley, 173 U. S., 507, 508.
See also opinion of supreme court of Mississippi, No. 9358, pamphlet copy on file in No. 319 here.

In their brief in opposition to our motion to dismiss or affirm in No. 320, on page 13, opposite counsel scout the idea that the decision of the railroad commission could be judicial, and therefore *res adjudicata*, but this is exactly what the supreme court of Mississippi has decided, and that in the second appeal of these *same parties*, in No. 9358 in the supreme court of Mississippi, which was a continuation of the *same litigation* in R. R. Co. *vs.* Adams, 73 Miss., 648, as is apparent from the inspection of the opinion in said No. 9358, a copy of which is on file in No. 319 here.

For fear that the attorneys for these railroad companies

may again escape and run at large in the green pastures of "new aspects" put upon the case by this decision, to their great and unprecedented surprise, we wish here to call the attention of the court to the fact that the point has been expressly and continuously made by us (see our brief in R. R. Co. *vs.* Adams, 73 Miss., 656, 657, and our replications and instructions in No. 244 here, in that record, on pages 59 and 115), and their failure to apply for certiorari has been willful and deliberate.

There is also another difference between the suits, in that the exemption claimed for the Canton, Aberdeen and Nashville Railroad Company in the first suit is a straight exemption, while that claimed in the two subsequent suits is claimed to be an appropriation of taxes to construction debts.

In the first two suits the presiding judge certified up the question of jurisdiction by reason of non-residence, which does not figure in the third suit. In other respects there is such a similarity in the motions, orders, proceedings, and decrees and certificates that we think we can argue them all together.

Opposite counsel in their last brief in No. 318 cite an authority of this court to the effect that it will not, on an appeal on the question of jurisdiction alone, consider the merits of the case, referring to the case of Huntington *vs.* Laidley, decided March 19th last. We have never disputed, and do not now dispute, that this is the correct practice. What we contend for is that the certificate of what grounds the final decree is based on cannot contradict *the decree itself*, which is the highest evidence of that fact, and that the decree on the face of it is based on one ground not certified, namely, that "the complainant has shown no right to invoke the jurisdiction of this court," and that the certificate itself does not on its face specify that the grounds certified are all the grounds on which the court acted, and this court has decided that the ground of want of jurisdiction of the

court as a Federal court must be the controlling ground. As the points made in the briefs on the merits in the three cases are substantially the same otherwise as in their brief on the motion to dismiss or affirm in No. 318, we will for convenience hereafter generally refer only to that brief. As we are not exactly pleased with the statements of the cases by opposite counsel, we ask the court to take the statements in our separate briefs as our view of the cases.

FIRST.

The Subsequent Proceedings and Judgments in the State Courts.

This is a question which lies at the threshold of any argument on the questions involved in the cases themselves. It is the question of *qui bono*. What is the use? What can be accomplished? We have argued this question in our separate briefs in Nos. 318, 319, and 320 on pages 15–17, 19, 20, and 11–15, respectively. In Nos. 318 and 320 the appellants filed the counter-affidavits of Mr. Edward Mayes that when the appeals from the lower courts were taken to the State supreme court supersedeas bonds were given under the State statute. Apprehending some such point after our briefs were prepared, we had printed and inserted in them, on page 17 in No. 318 and page 13 in No. 320, quotations from the Mississippi Code of 1892 to show that it was therein expressly provided, in section 32, that it made no difference whether supersedeas bonds were given or not: "In no case shall such appeal be held to vacate the judgment or decree."

In our briefs in support of the motions to dismiss or affirm we have cited this court to a large number of cases on pages 16 and 17 in No. 318 and 11–15 and 25–34 in No. 320, where such judgments or decrees are held to be *res adjudicata*. Opposite counsel have cited some to the

contrary, but the vast majority, including those of this court, are in our favor, and, so far as judgments and decrees in Mississippi are concerned, the fact that the appeal does not vacate them is settled by the above statute. The appellant's counsel attempt to avoid the force of this by claiming that it cannot be raised by motion, and quote from a Minnesota case. At best, that would be a mere technical point as to whether it should be raised by motion or plea, and, as it is raised on three weeks' notice, supported by affidavits *and resisted by counter-affidavits*, that would be a waiver of the point, and anyhow, under such circumstances, where the facts are now all before the court and the whole case is heard, it could be treated either as on motion or informal plea.

But even if it had not been thus waived, the practice is against that contention.

In the case of Marsh *vs* Shepard, 120 U. S., 597, it was raised by motion, which was denied solely on the ground that the motion was made by one of three appellants and not by the appellee, and was resisted by the other two appellants, and the court very properly held that one appellant had no right to dismiss an appeal against the consent of his co-appellants.

In the case of Mills *vs.* Green, 159 U. S., 651, where an injunction had been granted against the holding of a constitutional convention in South Carolina, the circuit court, on a hearing, continued the injunction to the regular hearing. An appeal was taken, and the circuit court of appeals reversed this ruling, dissolved the injunction, and ordered the bill to be dismissed, on June 16, 1895, and on September 4, 1895 (of course the difference between those dates and between April 25 and April 26 here is immaterial), an appeal was taken to this court, as in the cases at bar.

On page 563 this court says that its "duty is to decide actual controversies by which a judgment can be carried into effect, and not to give opinions upon moot questions, or

abstract propositions, nor to declare principles or rules which cannot affect the matter in issue before it. When an event occurs without the fault of the defendant, which renders it impossible for this court to grant the appellant any relief, the court will not proceed to a formal judgment, but will dismiss the bill;" and then the court says, "And such a fact, when not appearing on the record, may be proved by extrinsic evidence," and on that and the succeeding pages the court cites numerous instances dismissed on motion, and that case was dismissed on motion.

Opposite counsel are very much given to contending, but we do not suppose that even they would contend that the revenue agent was *at fault* in bringing suit at the earliest opportunity, when he could not sue in the Federal courts, and taxes before judgment do not bear interest, and there was no chance for him to obtain judgment in these injunction suits where he was *a defendant*, and when all further liability on the injunction bonds ceased when the appeals and bills were dismissed and he was left free to sue, *and other innocent purchasers might have appeared.*

In the case of Hubbell *vs.* The United States, in 171 U.S., 209, 210, this court has gone the length of holding that it was doubtful whether even the pendency of a motion for a new trial in the same court would prevent the operation of the judgment as an estoppel or *res adjudicata*, and certainly such a motion would suspend the issuance of execution.

It could not possibly hurt the appellants, for if they are sued in the State court and have a Federal question they can get it here by a writ of error, whether they are residents or non-residents. We wish to retract here a concession we made in our brief in No. 318, on page 16, to the effect that the rule should not apply where non-residence was the ground of jurisdiction, if *bona fide* and not collusive. We were led into that admission by the thought that non-residents sometimes get the benefit of Federal rules, which

were denied them in the State courts, and that hence where the claim of non-residence was well founded the Federal court should not release its jurisdiction, and opposite counsel, following in our wake and taking advantage of our slip in this particular, have, on pages 14–16 of their brief in opposition to our motion to dismiss or affirm in No. 320, vividly portrayed the disastrous consequences to the Federal courts from setting such precedents as we ask; but the answer to both of us, to our ill-advised concession and their contention, is that if there is any such separable controversy as would enable a non-resident to sue in the Federal court, he can equally as well remove the suit against him from the State court to the Federal court, and hence there is not, under any view of it, the same incentive or necessity for the Federal courts to retain jurisdiction as for other courts, for when once the State courts surrender their jurisdiction in such cases it is gone forever, never more to return by either removal or writ of error, and, as we have shown, the great majority of the State courts hold that the judgment *pendente lite* is *res adjudicata*, and that its force and effect is not affected by the pendency of a writ of error.

The case of Huntington *vs.* Laidley, decided by this court on March 19, is referred to by opposite counsel; but what we wish to call the attention of the court to here is that the real gravamen of the motions to dismiss on this ground is not that the judgments of the State courts are *res adjudicata*, except incidentally, but that the object of the bills is to prevent the revenue agent from suing, *and he has sued*, and hence the purpose and object of the suits have failed.

If it be claimed that the bills have a further object shown in the prayers for relief, which is not only to establish a perpetual injunction against the particular taxes in controversy, but to declare the contracts of exemption valid and to establish a perpetual injunction against all future taxes, the plain answers to that contention are that so far as the suits seek to do such a thing as that they are on their faces

clearly and incontestably suits against the State and forbidden by the eleventh amendment, and that neither the assessing board nor the revenue agent have any jurisdiction or authority to represent or bind the State as to future taxes, and if this court can now grant them leave to amend and eliminate this unconstitutional demand from the prayer of their bills, unasked by them and against their previous protest, seeing that they have not amended, but have appealed on the bill as it stands, as not involving a suit against the State, then we repeat that the suit as thus narrowed to proper limits has already failed, because the suits for the taxes in controversy have already been brought.

The question of *res adjudicata* or of a reversal by the State supreme court has nothing to do with the point at issue except incidentally. It is utterly immaterial as to whether the State court shall affirm or reverse, whether it shall decide in favor of the plaintiff or of the defendants. It was necessary for us to show the status of the suits in the State courts, to show that they had not been abandoned, and to do this we showed all the steps, and that they had finally passed into judgments, which were *res adjudicata*, but the real point is that neither the court below nor this court now have any lawful or physical power to prevent the revenue agent from suing, *because he has sued.*

Dunn v. Greene Co. 76 Miss 694

10092

SECOND.

There was no jurisdiction by reason of diversity of citizenship. This only applies to the first two cases, Nos. 318 and 319.

We think we have shown that under well-recognized rules of equity pleading and practice the Illinois Central Railroad Company had no right to raise jurisdiction in the Federal court, *nor in any other equity court*, by making the owner of the property a defendant and itself the sole plaintiff.

In each case the judge gives a synopsis of the bill prefatory to the certificate of grounds, but as in the order designating the parts of the record to be copied and sent up here the original bills are specified and are part of the record here, of course they are the best evidence of what is contained in them, and so as to the various interlocutory and final decrees. The certificates, omitting the special grounds certified, are all alike and as follows:

"Now therefore it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:" * * * "The court having dismissed the bill on the grounds of want of jurisdiction, the foregoing three questions arising upon the pleadings, the process, and the evidence, are hereby certified," &c.

It is not necessary for us to dispute the proposition contended for by opposite counsel in their brief in opposition to our motion to dismiss or affirm in No. 320, on page 8, that the certificate of the judge is in proper form, nor the proposition contended for in their similar brief in No. 318, that where the certificate is irregular, nevertheless this court will examine the record, and if it appears that the question

of the jurisdiction of the court, *as a Federal court*, was in issue, and was the controlling question, and was decided, this court will entertain jurisdiction. In paragraph 10 of their said brief, in No. 320, opposite counsel virtually admit that the Federal question must be the controlling one. It is not necessary for us to dispute these propositions here. What we do say is that the rule must work mutually and both ways, and where the certificate does not show that other questions were not decided, but the record shows that they were, this court will not entertain jurisdiction.

Now, in these cases we contend not only that the decrees import absolute verity, but we go further and say that here what was decided in the decrees is itself the very point at issue, and that as a physical fact of ocular demonstration the decrees themselves are the highest and best evidence, coming as they do like a tyrant and overthrowing all theories and mere assertion, whether by certificate or otherwise. It is incontestable that the part of the certificate, *supra*, that "the court having dismissed the bill on the grounds of want of jurisdiction, the foregoing three questions," &c., are certified, puts the grounds of want of jurisdiction in the plural number, showing that there were more than one, and yet not showing that the three grounds certified embraced all, and especially not stating, "On the grounds of the want of (ITS) jurisdiction" *as a Federal court*, or any equivalent words or expression, to show that want of jurisdiction as a court of equity or court generally was not meant.

The restraining order was discharged and injunction refused on two grounds stated in the decree, viz: That "the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction." Then a motion was made at the next term of the court to dismiss the bill because the sole object of the bill was for an injunction which had been refused, and an appeal to the United States circuit court of appeals dismissed for want of jurisdiction. Then follows the final

decree dismissing the bill from which this appeal is taken. That decree adjudges "that said motion be, and the same is hereby sustained, and that the original bill be and the same is hereby dismissed."

Under a proper showing a bill can be amended after an injunction has been refused or dissolved, and the injunction still granted or reinstated.

1st Smith's Chan. Prac., marg. pp. 623–626.

Here no leave was asked to amend, and in that state of case the dismissal of an injunction bill naturally and necessarily follows in due course the refusal or dissolution of the injunction, for the simple and plain reason that there is nothing else the court can do. It leaves an unbridged chasm which cannot be crossed.

From this it also naturally and necessarily follows that the ultimate ground or grounds on which such a bill is dismissed is or are identical with that or those on which the injunction was refused or dissolved.

Our contention is that the second finding in the decree refusing the injunction, "that this court has no jurisdiction," is not necessarily confined to, but does embrace all questions of the jurisdiction as a Federal court, and hence all the questions certified, and that the first finding, that "the complainant has shown no right to invoke the jurisdiction of this court," must be referred to some subject-matter other than that of an inherent want of jurisdiction in the court, else it would be entirely unnecessary and superfluous.

We think it plainly refers not to an insufficiency of jurisdiction, but to an insufficiency of showing to call forth an exercise of that jurisdiction, "has shown no right to invoke the jurisdiction," admitting that it does exist and extends to the subject-matter of the suit, but that for some reason the plaintiff has failed to show why he has a right to invoke it. That does not go to the jurisdiction of the court as a

Federal court, at least not necessarily so, but to the disability or want of right of the plaintiff to bring the suit.

We have attempted to show that the plaintiff has shown no right to sue either as a lessee, creditor, stockholder, or bondholder under any recognized head of equity rules. In their brief in opposition to our motion to dismiss or affirm, in No. 318, opposite counsel do not seem to attempt even to dispute this, but endeavor to escape its force by asking this court to arrange the parties on the proper side of the docket, as they do in petitions for removal and other proper cases; but in a case like this it cannot be done. It could be done if the defendant railroad companies and trustee had on request refused to sue, and the plaintiff had for that reason been forced to sue alone, and make them defendants; but in this case the plaintiff has not been forced on one side of the docket by its antagonist or by circumstances over which it had no control, and was therefore entitled to ask protection at the hands of the court. It was a voluntary matter and entirely unnecessary, and to place and arrange the parties on the proper side of the docket here would overturn one of the most salutary rules of equity pleading and practice, and this without regard to whether any Federal question was involved. That is utterly immaterial. An improper plaintiff has no more right to go into the Federal court on a Federal question than on any other question, and no more than he has to go into any other equity court.

But we go further than that, and have endeavored to show, *supra*, that the basis of want of jurisdiction here is not a lack of diversity of citizenship alone, or the presence or absence of any Federal question, but an utter want of authority to file a bill in any court of equity under the circumstances *shown and not shown* in these two cases.

Hence we claim that in no view of it is this a case where this court would be justified in arranging the parties on the appropriate sides of the docket, and thus CREATING a jurisdiction for the parties where none before existed.

THIRD.

Amount Not Sufficient to Confer Jurisdiction.

We have argued this point as to Nos. 318 and 319 in our separate briefs, on pages 25, 26, and 27, 28, respectively.

The same objection applies to the bill in No. 320. In paragraph 19, Record, p. 10, in that case, it is said that more than $2,000 is due in each county, but the State and municipal taxes are all collected *in the counties.*

Mississippi Annotated Code of 1892, § 3801.

And it is not shown that as much as $2,000 is due *to any county,* or to the State, or any town in any county, and this court holds that these taxes are all severable, and that it must affirmatively appear what amounts are due *to each* to confer jurisdiction.

See above briefs in No. 318 and No. 319, and Holt *vs.* Ind. Mfg. Co., 176 U. S., 72, 73.

FOURTH.

No. 318: Innocent Purchaser.

So far as the Illinois Central Railroad Company being an innocent purchaser is concerned, the eighth and fourteenth paragraphs of their bill in this case (Record, pp. 8 and 14) show that it procured the charter of the Canton, Aberdeen and Nashville Railroad Company, advanced the money to build it, and leased the road under an agreement with the judiciary committee of the legislature and the governor, and that everything it has done was agreed to and contemplated in the charter before and at the time it was granted, and hence it occupies and can occupy no different or better attitude, but only the identical attitude which the Canton,

Aberdeen and Nashville Railroad Company itself occupies. It has done nothing since the charter was granted or on the faith of any subsequent decisions which entitles it to any other or different consideration in law, equity, or morals, and hence there can be no claim or pretense by which it has or could have any separate or independent rights to sue for which would not be equally available to the Canton, Aberdeen and Nashville Railroad Company or which would justify any separation of interests or placing them in an adversary position on the docket.

The charter was granted on February 17, 1882, and the road built in 1882–1884. At that time there had been no tax decision except the Mississippi Mills case, in 56 Miss., p. 40, in 1878. The next case was the McCulloch case, in 64 Miss., at the October term, 1886, and that simply decided that outlying lands of a railroad company were liable to taxation. That was all that was involved. The next case was the Taylor case, in 1891, in 68 Miss. Hence the only decision on which the plaintiff could have relied was the Mississippi Mills case.

That case decided that under sections 13 and 20 of article 12 of the constitution of December 1, 1869, the legislature could grant repealable exemptions to all factories of a certain class, but did not decide and the reasoning of the court on pages 54, 55, and 62–65 is against the proposition that the legislature could discriminate by granting exemptions to one corporation or one individual, while others of the same class were taxed.

And in regard to the privilege taxes which were imposed on railroads by the "Laws of 1884," pp. 29, 30; the "Laws of 1886," p. 23; the "Laws of 1890," pp. 12, 13, and section 3379 of the Code of 1892, it is expressly held in the case of Holberg *vs.* Macon, 55 Miss., pp. 114, 115, that "all that is necessary in levying them is that all persons pursuing the same occupation shall be taxed to the same amount or in the same ratio."

So it is evident that the exemption involved in this case is a very different one from that in the Mississippi Mills case. In the case on writ of error here as No. 244 the supreme court of Mississippi decided two things applicable here: First, that the legislature had no power to grant exemptions like this one to a single corporation (see record in that case, pp. 659–671), and that all pretended exemptions were repealed by the laws of 1886 and Code of 1892 (see *ibid.*, pp. 671–673); and this court, in the case of Wood *vs.* Brady, 150 U. S., 20–23, hold that where the charters are not identical the rule of *stare decisis* does not apply, and the decision of the State court is conclusive on it and raises no Federal question; and as to the repeal, it is difficult to see how a decision that a repealable exemption was repealed could give color for any Federal question. Besides, when the bill was filed in this case, in August, 1898, it had not been decided that exemptions were repealed. This decision was rendered on November 22, 1898.

FIFTH.

No. 320.

The same reasoning as under the previous head applies to the original Louisville, New Orleans and Texas Railway property in No. 320. That charter was also granted in the acts of 1882 and 1884 after the Mississippi Mills case and before any other case was decided. This case is for the taxes of 1898, and the Supreme Court in the case No. 244, now pending here, has decided in suits for the taxes of 1892–1897 that for several reasons that property is liable to taxation. See their exhaustive opinion in the record in No. 244, pages 638–676.

That decision cannot be attacked collaterally by a bill in the Federal court, this court remarking that "if the State

court erred in its judgment, it is mere error and cannot be corrected through the medium of bills such as those under consideration."

Blythe *vs.* Hinkley, 173 U. S., 507, 508.

On this point, see our brief in No. 320, pages 25–34, 42.

175 U. S. 631–637. 174 643–647.

We now direct the attention of this court particularly to the fact that the bill in this case, No. 320, while it would be considered to be skillfully and adroitly drawn under other circumstances, yet in this case is purposely made vague and uncertain, as shown in our separate brief, under the heads of D, pages 36–38, and E, pages 38–43, in that it does not show that the taxes were appropriated to construction debts before the year 1898 or what became of the surplus of profits in 1898, and claims that a railroad company formed in 1884 *built a railroad in the years 1882–1884.*

But, worse than that, it utterly fails to call the attention of the court to the decision of the Supreme Court in No. 244 in reference to this same property, and they obtained an *ex parte* restraining order on this bill. The rule in such cases we understand to be—

"Where a party applies *ex parte* for a special injunction, he is bound to state in his bill every material fact, and set up every material document, bearing upon the subject-matter of the litigation, so far as it can affect the question of the injunction prayed for, and where any material fact or docment is omitted and not brought to the attention of the judge in hearing the application for an *ex parte* injunction, the court will immediately order the discharge of the injunction, and direct restitution of any change effected thereby."

Story's Equity Pldgs., § 730 (*b*) and n. 4.

And in this case we think this was certainly sufficient ground for discharging the restraining order, and also for refusing the injunction in that indefinite and uncertain

state of the bill, where no right was shown to invoke the jurisdiction of the court.

And in the record in No. 244, page 412, and R'y Co. *vs.* Blythe, 69 Miss., 943, 944, and N. O., B. R., V. & M. R. R. Co. *vs.* Brown. 64 Miss., 479, and M. & V. R. R. Co. *vs.* Cocke, 64 Miss., 713, and the record in case No. 5513, in connection with the last-named case, filed as a part of it in No. 244, it is shown that the railroad was not built by the Louisville, New Orleans and Texas Railway Company at all, but before it was formed and by one of its constituent companies, which had no exemption, viz., the said N. O., B. R., V. & M. R. R. Co. (See pages 16–18, 25, and 50–54 of said Record No. 5513.)

SIXTH.

Nos. 319 and 320.

As to the Natchez, Jackson and Columbus Railroad Company and that property, that charter, if considered as granted in 1870, was granted before the advent of the Mississippi Mills case, and hence there could have been no reliance on anything except the plain, palpable attempt to evade the constitution of 1869, and this court and every other court, and now the supreme court of Mississippi, all hold that pretended grants of exemption under that and similar constitutions are void *ab initio*.

See opinion in No. 244, pp. 638–676.

And, besides, we particularly call the attention of this court to the fact that neither the charters of this Natchez road nor of the Memphis and Vicksburg Railroad Company, one of the constituents forming the Louisville, New Orleans and Texas Railway Company, were accepted or gotten on the faith of any exemption, for the simple reason that they were both procured originally without any exemption, and that after this twenty-first section had been worked

through the legislature for the Mobile and Northwestern Railroad Company these two companies and a lot of others rushed in and got it extended to them by a general bunching act.

Laws of 1870, p. 327.

Which shows that the question of exemption was not a part of the original contract nor any inducement or incentive in it, but a mere matter *of take all you can get*, and an afterthought.

On the other hand, if the exemption was repealed by the Code of 1880 and re-enacted in 1884, as held in the Lambert case, in 70 Miss., then, as the railroad had already been built, the new exemption was without consideration and entitled to no protection from the Federal Constitution, as held by this court in—

Grand Lodge *vs.* New Orleans, 166 U. S., 146–150.
See Record in No. 319, p. 10.

As to any claim of *bona fide* purchaser by either the Louisville, New Orleans and Texas Railway Company or the Illinois Central Railroad Company, it is sufficient to say that the purchase by the first was made in March, 1890, the purchase by the latter of bonds and stock was made in July, 1892, and the consolidation was in October, 1892, all before the Lambert case was decided, and besides this court has settled the doctrine in Central Land Co. *vs.* Laidley, 159 U. S., 109–112, that the question of *bona fide* purchaser is not a Federal question. As to the contention that the Illinois Central Railroad Company issued any bonds after the Lambert case was decided in 1893, *and in reliance on it*, that is a palpable mistake, for the simple reason that the Illinois Central railroad mortgage of *September 1, 1892*, expressly provided for the issuance of the bonds, and surely they did not rely on the Lambert case then.

Hence there was no jurisdiction by virtue of any proper Federal question under the second certified ground.

SEVENTH.

No. 319 and No. 320.

In both these cases it is admitted that the receipts which the sheriffs and tax collectors were required to give on the delivery of the affidavits required in said section 21 were not given. In No. 320 it is averred that the tax collectors refused to receive the affidavits or give the receipts. We have answered this averment in our separate brief in that case on pages 34, 35.

In No. 319 the plaintiff attempts to make two points in reference to this subject of the receipts. In the seventeenth and eighteenth paragraphs of the bill, Record, pages 23–25, it is alleged that the failure to deliver the affidavits and obtain the receipts was due to the neglect and failure of the assessing officers to assess the property, and, second, that this is immaterial, as the plaintiff and the Yazoo and Mississippi Valley Railroad Company had a right to presume that the affidavits had been made and the statute complied with, and are innocent purchasers.

In regard to the first point it is sufficient to say that under chapter 10, sections 597–608, of the Code of 1880, under which assessments were made, until replaced by chapter 116, sections 3875–3884, of the Code of 1892, that section 597 expressly required the railroad companies to furnish and file with the auditor of public accounts schedules of their property in order that assessments might be made, and there is no allegation or pretense in the bill that this necessary and preliminary duty was ever complied with by the Louisville, New Orleans and Texas Railway Company, and it is a very remarkable theory attempted to be palmed off on a court that a party can take advantage of his own wrong. But for fear that the court might expatriate them to climes where such a contention would find more congenial

ears, they hurry on and say that is all immaterial because they are *bona fide* purchasers.

We here particularly call the attention of the court to the fact that the Yazoo and Mississippi Valley Railroad Company *is made a defendant* in No. 319, and is not complaining at all, and that the Illinois Central Railroad Company is not a purchaser at all. We really do not see where it comes in, because its protegé, the Mississippi Valley Company, which is not made a party, holds the stock, and the Illinois Central Railroad Company has substituted in the open market its own bonds for those of the Louisville, New Orleans and Texas Railway Company, the bonds of the latter company being merely deposited as a kind of collateral security, but which draw no interest and no payment. We confess we cannot see clearly through that kind of business. The Louisville, New Orleans and Texas railway bonds are merely collateral security *to the creditors* of the Illinois Central Railroad Company. What legal interest has the Illinois Central Railroad Company here? Neither the principal nor interest is paid. They are a mere pledge of the property of the Louisville, New Orleans and Texas Railway Company to secure bonds of the Illinois Central Railroad Company, and it seems to us that if anybody has a right to complain here, it would be the holders of the bonds of the Illinois Central Railroad Company, whose bonds were being impaired. What has the Illinois Central Railroad Company to do with it? The L., N. O. & T. and N. J. & C. R. R. Co. bonds are a mere pledge or security to creditors that the interest and principal of the bonds of the Illinois Central Railroad Company would be paid. There is nothing to be paid on the L., N. O. & T. or N. J. & C. bonds. If it be said that the Illinois Central Railroad Company has such an interest that it has a right to have the profits of the Yazoo and Mississippi Valley Railroad Company applied on its own Illinois Central bonds, the answer to this is that there is nothing in its mortgage of September 1, 1892, or

in the record to show this, and, if there was, they are not entitled to the aid of a court of equity to make the application, because, through the Mississippi Valley Company, they had the absolute control of the Yazoo and Mississippi Valley Railroad Company and could make the application themselves *without resorting to a suit against themselves.*

But if we concede that it is both a stockholder and a bondholder, then any claim to relief by virtue of its being a *bona fide* purchaser is untenable in this class of cases. It is a well-known fact—part of the history of the times, of which this court will take judicial notice—that the stocks and bonds of the great railroad corporations are constantly changing hands in the open market, and if every purchaser has a right to presume that back taxes have been paid, it would simply amount to a denial of the right or authority to collect delinquent taxes at all.

This court has several times, and once where the Yazoo and Mississippi Valley Railroad Company was concerned, decided that these back taxes can be collected.

Y. & M. V. R. R. Co. *vs.* Thomas, 132 U. S., 185.
Winona *vs.* Minnesota, 159 U. S., 528, 529.
Vicksburg, &c., *vs.* Dennis, 116 U. S., 665.

See also to the effect that there can be no innocent purchaser against back taxes:

Hannibal *vs.* City of Kansas, 81 Mo., 285, and cases.
Delaware, &c., *vs.* Commonwealth, 50 Pa. St., 399.
Our separate brief in No. 318, p. 37.

The statute expressly makes taxes a legal lien on the property paramount to all others, and hence all must take notice that when a liability for taxes is fastened on property it must per force be superior to any claim they may have.

Code 1880, § 470; Code 1892, § 3746.

Even if it were not paramount, but merely entitled to priority according to its date, like a mortgage or trust deed, a purchaser cannot rely on the presumption that it has been paid or become barred by limitations. His only safe course is to consult *the creditor*, where he will find the truth. Any application to the proper authorities would have disclosed the fact that these taxes had not been paid, and the purchaser would have had to assume the risk.

Plant *vs.* Shryock, 62 Miss., 821.

Bowmar *vs.* Peine, 64 Miss., 104, 105.

And the above case in 62 Miss. was decided at the *April term, 1885*, before any of the taxes in controversy accrued, the revenue agent only being authorized to collect taxes back to and including the year 1886.

Laws of 1894, pp. 29–31, § 6.

Other questions are argued in our separate briefs in each case to which we respectfully refer the court, as well as to briefs of associate counsel.

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